

A certificated domestic repair station may not maintain or alter any airframe, powerplant, propeller, instrument, radio, or accessory for which it is not rated, and may not maintain or alter any article for which it is rated if it requires special technical data, equipment, or facilities that are not available to it.

which it was not rated, and section 145.61 of the FAR (14 C.F.R. §145.61)<sup>3/</sup>, by failing to maintain adequate records of that work. However, he found that the preponderance of the evidence did not establish a violation of section 43.13(a) of the FAR (14 C.F.R. §43.13(a))<sup>4/</sup>, which requires that aircraft maintenance be performed in accordance with the manufacturer's maintenance manual, or other methods acceptable to the Administrator. The law judge reduced the civil penalty from \$2,500 to \$1,500.

For the reasons discussed below, Respondent's appeal is dismissed and Complainant's appeal is granted.

Dismissal of Respondent's Appeal as Untimely Perfected

Complainant, through its agency attorney, has filed a motion to dismiss Respondent's appeal for failure to file a

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3/ Section 145.61 of the FAR (14 C.F.R. §145.61) provides:

- Each certificated domestic repair station shall maintain adequate records of all work that it does, naming the certificated mechanic or repairman who performed or supervised that work. The station shall keep each record for at least two years after the work it applies to is done.

4/ Section 43.13(a) of the FAR (14 C.F.R. §43.13(a)) provides, in pertinent part:

Each person performing maintenance, alteration, or preventive maintenance on an aircraft, engine, propeller, or appliance shall use the methods, techniques, and practices prescribed in the current manufacturer's maintenance manual or Instructions for Continued Airworthiness prepared by its manufacturer, or other methods, techniques, and practices acceptable to the Administrator . . . .

timely appeal brief. The law judge's oral initial decision was issued on November 1, 1989 at the conclusion of the hearing. Respondent filed a timely notice of appeal. Pursuant to section 13.233(c) of the Rules of Practice in FAA Civil Penalty Actions ("Rules of Practice") (14 C.F.R. §13.233(c)<sup>5/</sup>), an appeal must be perfected by the filing of an appeal brief within 50 days of the entry of the oral initial decision on the record. Accordingly, Respondent's appeal brief was due on December 21, 1989. By letter dated December 13 (postmarked December 14), Respondent requested an extension of time for filing of its appeal brief. Although the letter did not specify any particular length of time, the agency attorney, in his opposition to the request, referred to Respondent's "request for an additional 30 days."

On December 22, an order was issued granting Respondent a limited 10-day extension of time for the filing of its appeal brief, to run from the date of service of that order. FAA v. Thunderbird Accessories, Inc., FAA Order No. 89-0008 (Dec. 22, 1989). It should be noted that, because the order granting the extension was served upon Respondent by mail, Respondent was also entitled to an additional 5 days within which to file its

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<sup>5/</sup> Section 13.233(c) of the Rules of Practice (14 C.F.R. §13.233(c)) provides in pertinent part:

Unless otherwise agreed by the parties, a party shall perfect an appeal, not later than 50 days after entry of the oral initial decision on the record . . . by filing an appeal brief with the FAA decisionmaker.

brief, pursuant to section 13.211(e) of the Rules of Practice (14 C.F.R. §13.211(e)). Accordingly, Respondent's appeal brief was due on January 8, 1990,<sup>6/</sup> the first business day after the extended due date. See 14 C.F.R. §13.212(c). Respondent's appeal brief, dated January 19, 1990 (postmarked January 22, 1990), was thus untimely filed. Because Respondent has demonstrated no good cause for this untimeliness, the appeal is subject to dismissal under section 13.233(d)(2) of the Rules of Practice (14 C.F.R. §13.233(d)(2))<sup>7/</sup>.

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<sup>6/</sup> The agency attorney asserts, in Complainant's motion to dismiss, that Respondent's brief was due on January 2, 1990. The agency attorney's failure to give Respondent the benefit of the 5-day mailing rule (14 C.F.R. §13.211(e)) may be based on the fact that, as recited in footnote 5 of the order granting the extension, the Appellate Docket Clerk informed Respondent by telephone on December 21st that a 10-day extension of time would be granted. However, there is no need to decide whether the extension was actually granted by that telephone call (in which case Respondent would not be entitled to an additional 5 days under the mailing rule), or by the subsequent written order (thus allowing the additional 5 days) because Respondent's brief would have been untimely in either case.

<sup>7/</sup> Section 13.233(d)(2) of the Rules of Practice (14 C.F.R. §13.233(d)(2)) provides:

(2) The FAA decisionmaker may dismiss an appeal, on the FAA decisionmaker's own initiative or upon motion of any other party, where a party has filed a notice of appeal but fails to perfect the appeal by timely filing of an appeal brief with the FAA decisionmaker.

Disposition of Complainant's Appeal.

The agency attorney argues in Complainant's appeal brief that, 1) contrary to Respondent's contention, Complainant's notice of appeal was timely; 2) the preponderance of the evidence proves that Respondent violated section 43.13(a) of the FAR and the law judge should not have dismissed that charge; and 3) the full civil penalty of \$2,500 should be reinstated.

Respondent raised the issue of the timeliness of Complainant's notice of appeal in a document titled "Notice of Protest." Respondent argues that Complainant's appeal be "thrown out" because the notice of appeal, which Respondent asserts was due by Friday, November 10, 1989, was not filed until Monday, November 13, 1989. I have treated this document as a motion to dismiss pursuant to sections 13.218 and 13.233 of the Rules of Practice (14 C.F.R. §§13.218 and 13.233).

Citing the law judge's statement at the hearing on November 1 that the 10-day time period for filing a notice of appeal "start[ed] ticking" on that day, Respondent calculated that Complainant's notice of appeal was due by Friday, November 10. However, this calculation is incorrect because, as the agency attorney points out in Complainant's appeal brief, under section 13.212(b) of the Rules of Practice (14 C.F.R. §13.212(b)), the date of the hearing (November 1) is not included in the designated time period. Moreover, due to the fact that November 11 was a Saturday, the notice of appeal was

not due until Monday, November 13, 1989, in accordance with section 13.212(c) of the Rules of Practice (14 C.F.R. §13.212(c)).<sup>8/</sup>

Turning next to the issue of whether the preponderance of the evidence supports a violation of section 43.13(a) of the FAR (14 C.F.R. 43.13(a)), a brief discussion of the pertinent facts will be helpful. In September 1988, Respondent overhauled a Chrysler aircraft alternator, which was subsequently installed in a Piper PA-32 aircraft. Approximately two weeks later, after only 26.05 hours of aircraft flying time, the alternator failed in flight. The failure was caused by particles of lead epoxy which had come loose from the alternator's rotor blades, slowing or stopping the motion of the rotor blades and damaging the interior of the alternator. Respondent's mechanic (who also appeared as its representative at the hearing), Paul Finefrock, admitted that he had applied the lead epoxy during the overhaul in order to balance the alternator's rotor blades.

Section 43.13(a) requires persons performing aircraft maintenance to use "the methods, techniques, and practices prescribed in the current manufacturer's maintenance manual or

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<sup>8/</sup> Section 13.212(c) of the Rules of Practice (14 C.F.R. §13.212(c) provides:

The last day of a time period is included in a computation of time unless it is a Saturday, Sunday, or a legal holiday. If the last day of the time period is a Saturday, Sunday, or legal holiday, the time period runs until the end of the next day that is not a Saturday, Sunday, or legal holiday.

Instructions for Continued Airworthiness prepared by its manufacturer, or other methods, techniques, and practices acceptable to the Administrator." 14 C.F.R. §43.13(a). The parties agree that Chrysler neither supplied a manufacturer's maintenance manual for the alternator here at issue, nor issued any Instructions for Continued Airworthiness. The overhaul specifications for the Chrysler alternator are set forth in the maintenance manual for the Piper PA-32 aircraft. This manual, which was not introduced into evidence at the hearing, is apparently accepted as a substitute for the manufacturer's maintenance manual.

FAA Aviation Safety Inspector Don Cook testified at the hearing that the Piper manual does not specify that lead epoxy may be applied to balance the alternator's rotor blades. Accordingly, he explained, that procedure constitutes a major alteration for which Respondent was required to obtain FAA approval. This could have been accomplished, Inspector Cook stated, by applying for a supplemental type certificate, or by obtaining "field" approval after submitting appropriate engineering data to support the proposed procedure. Inspector Cook, who visited Respondent's repair facility in connection with investigating this case, testified that Respondent had nothing to show that the procedure had been approved by the FAA.

At the time of the overhaul and subsequent FAA investigation, Respondent did not possess the Piper manual. Respondent also failed to produce any evidence that the FAA had approved its application of lead epoxy to balance the rotor

blades of the Chrysler alternator. Mr. Finefrock asserted, in Respondent's answer and in argument to the law judge at the hearing,<sup>9/</sup> that the procedure is commonly used in the industry and that, in the past, an FAA inspector named Harold Wright, as well as several other unidentified FAA inspectors, had orally "approved" Respondent's use of the procedure after demonstrations of the procedure on alternators manufactured by other companies.<sup>10/</sup> Not only did Mr. Finefrock fail to present any documents or witnesses to corroborate these assertions, but later in his statement he appeared to concede that Inspector Wright had in fact explained to him that

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<sup>9/</sup> Respondent's entire case at the hearing consisted of a lengthy statement by its pro se representative, Mr. Finefrock, in response to the law judge's invitation to make an "opening statement" at the conclusion of the agency's case. After Mr. Finefrock had completed his statement, the law judge asked if he intended to call any witnesses, to which Mr. Finefrock responded "No sir. We don't need any witnesses." Although he himself was never sworn in as a witness, much of what Mr. Finefrock said was in the nature of testimony. It is unclear to what extent the law judge considered Mr. Finefrock's statement to be testimony or merely argument. In general, law judges should explain to pro se litigants what the purpose of opening arguments are, and that their unsworn statements or denials of wrongdoing carry no weight as evidence. Law judge's should give such litigants the opportunity to testify under oath as soon as it becomes apparent that "testimonial," rather than "argumentative," information is being imparted. In this case, however, my decision would not change even if Mr. Finefrock's statements had been given under oath.

<sup>10/</sup> Even assuming that the FAA had informally approved Respondent's use of this procedure for some types of alternators, it seems highly unlikely that the FAA would have approved Respondent's use of this procedure to balance the Chrysler alternator in light of the fact that, as Respondent readily admits, its operations specifications did not even authorize it to work on that make of alternator.

Respondent needed to get approval for each part he balanced.

The only technical documents Respondent had available for guidance in the overhaul of the Chrysler alternator were a manual pertaining to another make of alternator which described the use of lead epoxy for balancing, and several pages of instructions from an automotive manual, including a list of parts which correlated to the parts listed on Respondent's work order for the alternator overhaul here at issue. Mr. Finefrock asserted at the hearing that the instructions he had were "almost word for word paraphrased" in the Piper manual, but it is not clear what instructions he was referring to, or to what those instructions pertained. Respondent has not disputed Inspector Cook's testimony that the Piper manual does not specifically allow for the use of lead epoxy in balancing the Chrysler alternator rotor blades. Therefore, it is irrelevant that Respondent may have used data similar, or even identical, to what appears in the Piper manual because that manual does not even address the balancing procedure here at issue.

Since the procedure Respondent used was not prescribed in the current manufacturer's maintenance manual, Respondent would run afoul of section 43.13(a) unless that method was "acceptable to the Administrator." As noted above, that procedure constitutes a major alteration for which Respondent was required to obtain FAA approval. Unless and until Respondent obtained appropriate FAA approval, the procedure was not "acceptable to the Administrator" within the meaning of

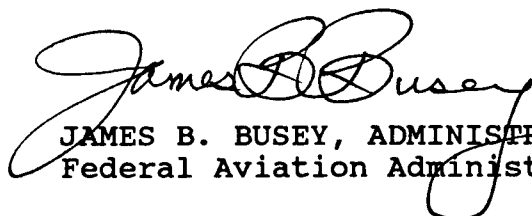
section 43.13(a). The preponderance of the evidence clearly demonstrates that Respondent had not received approval for its use of that procedure.

The law judge did not directly address the issue of whether the procedure used by Respondent was "acceptable to the Administrator." In dismissing the section 43.13(a) allegation "for failure of proof", the law judge held only that "the preponderance of the evidence [did] not establish what the actual deviation from the Piper manual was." But, as discussed above, Complainant was not necessarily required to prove a specific deviation from the manual in order to show a violation of section 43.13(a). Having proved by a preponderance of the evidence that the procedure was not prescribed by the manual, Complainant needed to show only that the procedure had not otherwise been deemed acceptable to the FAA.

Complainant also appears to argue that Respondent violated section 43.13(a) by overhauling the Chrysler alternator when it failed to possess the Piper manual containing overhaul specifications. In light of the fact that the Piper manual does not even address the balancing procedure used here, it is immaterial to this alleged violation of section 43.13(a) whether Respondent possessed that manual when it performed the procedure. Moreover, the plain language of section 43.13(a) does not mandate actual possession of the manufacturer's manual. It requires only that maintenance be accomplished in accordance with the practices prescribed in the manual.

I find that the preponderance of the evidence establishes that Respondent failed to obtain appropriate FAA approval for its use of lead epoxy in balancing the Chrysler alternator, and that Respondent's employment of that unapproved technique was unacceptable to the Administrator and in violation of section 43.13(a). Due to the fact that the law judge appears to have reduced the civil penalty from \$2,500 to \$1,500 solely because of his dismissal of the allegation that Respondent violated section 43.13(a), the \$2,500 civil penalty will be reinstated.

THEREFORE, the law judge's oral initial decision is reversed in part as described in this opinion. A civil penalty in the amount of \$2,500 shall be assessed.<sup>11/</sup>

  
JAMES B. BUSEY, ADMINISTRATOR  
Federal Aviation Administration

Issued this 16<sup>th</sup> day of March, 1990.

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<sup>11/</sup> Complainant, through its agency attorney, shall promptly prepare and issue an Order Assessing Civil Penalty, citing as authority this Decision and Order which I am issuing today. The Order Assessing Civil Penalty shall be effective upon service and shall remain in effect unless stayed by subsequent order.

Respondent may appeal this Decision and Order by petition for review in an appropriate United States Court of Appeals pursuant to section 1006 of the Federal Aviation Act of 1958, as amended (49 U.S.C. App. §1486), and section 13.235 of the Rules of Practice (14 C.F.R. §13.235) not later than 60 days after service of this Decision and Order.